Loss of Consortium and Engaged Couples: The Frustrating Fate of Faithful Fiancées

I. INTRODUCTION

Recent years have seen a nationwide flurry of cases challenging the common-law view disfavoring loss of consortium actions brought by members of unmarried couples.[1] While in most of these cases the problem has been that the members are unmarried cohabitants, the courts also have been forced to examine a number of related issues. One issue that has generated substantial litigation is whether an action for loss of consortium should be allowed when the individuals are engaged[2] at the time of the injury.

Generally, courts faced with the issue of engaged couples' claims have followed the traditional view that a cause of action for loss of consortium must be based on a legally valid marital relationship.[3] Yet, in *Sutherland v. Auch Inter-Borough Transit Co.*[4] the United States District Court for the Eastern District of Pennsylvania held that marriage at the time of the accident was not a prerequisite to a suit for loss of consortium. Though criticized as a fact-specific holding[5] and a misapplication of Pennsylvania law,[6] the district court's finding that the general rule denying recovery may yield to "special circumstances in unusual cases"[7] necessitates an inquiry into the policies that support the denial of engaged couples' consortium claims and the applicability of those policies in today's law. This Comment will analyze the feasibility of a right of recovery for loss of consortium to persons engaged at the time of injury. After examining the history of the consortium doctrine in American common law, it will evaluate the traditional tort policies that both favor and disfavor unmarried couples' consortium claims.

II. THE EVOLUTION OF THE CONSORTIUM DOCTRINE

A. *Historical Background*

The historical development of the consortium doctrine has reflected the changing societal and legal views of marriage that are embodied in the relative

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1. See cases collected in Bulloch v. United States, 487 F. Supp. 1078, 1080 (D.N.J. 1980).

2. For purposes of this Comment, "engaged" will be understood to be limited to that group of people who were engaged at the time of their injury, were subsequently married, and later filed a loss of consortium action.

3. *See, e.g.*, Angelet v. Shivar, 602 S.W.2d 185, 186 (Ky. Ct. App. 1980).

4. 366 F. Supp. 127 (E.D. Pa. 1973). *Accord* Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980). *See infra* text accompanying notes 63–77.

5. *See* Angelet v. Shivar, 602 S.W.2d 185, 186 (Ky. Ct. App. 1980).

6. See Rockwell v. Liston, 71 Pa. D. & C.2d 756 (C.P. Fayette County 1975), a subsequently decided Pennsylvania case that did not follow the holding in *Sutherland* although the spouses were engaged at the time of the injury and married shortly thereafter.

7. 366 F. Supp. 127, 134 (E.D. Pa. 1973).

rights accorded husband and wife.[8] Traditionally the common law defined consortium only in terms of the husband's right to be secure in the marital relationship.[9] It therefore granted the husband a right to his wife's services. Since the wife's services were comparable to those of servants, any injury to her that interfered with this master-servant relationship brought about the husband's right to recover for the loss of consortium.[10] The wife, however, had no parallel cause of action for injury to her husband and her resulting loss of consortium.[11] Because the husband was the master and owed no services to his wife, the proceeds of any recovery by the wife were considered his property. Courts reasoned that when the husband was injured his recovery was sufficient to compensate for the injury to the marital relationship; any recovery by the wife was included in his award.[12] In addition, because a woman's legal identity was merged into her husband's at marriage, the wife was a nonperson at common law and, hence, was procedurally incapable of bringing suit in her own right.[13] Thus, at common law the wife faced both substantive and procedural barriers to a loss of consortium recovery.

The law of consortium reflected the growth and development of the common-law tort concept of negligence. Courts began to recognize a cause of action for the husband based on negligent impairment of consortium.[14] Although the services element remained the dominant component in any consortium action, courts began to acknowledge the less tangible emotional aspects of the marital relationship, such as love, companionship, and conjugal affection.[15] Despite the development of this more contemporary concept of consortium, the rights of consortium still belonged solely to the husband because courts continued to respect the social and procedural barriers facing married women.

In the late nineteenth century the Married Women's Acts eliminated these obstacles.[16] The Acts granted legal recognition to the wife as a person apart from her husband and reflected a broad change in social policy concerning the property rights of women.[17]

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8. *See generally* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930); Comment, *The Development of the Wife's Cause of Action for Loss of Consortium*, 14 CATH. LAW. 246 (1968); Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864 (1976).

9. At the time of marriage the husband was granted a property interest in the wife, who was treated like a valued chattel. *See, e.g.*, Brown v. Philadelphia Transp. Co., 437 Pa. 348, 263 A.2d 423 (1970); Neuberg v. Bobowicz, 401 Pa. 146, 162 A.2d 662 (1960); Kelly v. Mayberry Township, 154 Pa. 440, 26 A. 595 (1893).

10. Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 653 (1930).

11. Case Note, 11 ST. MARY'S L.J. 237, 239 (1979).

12. *Id.*

13. *Id.* at 238–39.

14. Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

15. Comment, *Negligently Caused Loss of Consortium—A Case for Recognition as a Cause of Action in Connecticut*, 2 CONN. L. REV. 399, 400 (1969).

16. Leaphart & McCann, *Consortium: An Action for the Wife*, 34 MONT. L. REV. 75, 79–80 (1973).

17. Though the specific state statutes varied, they generally granted a wife (1) separate ownership of her property; (2) the right to sue without joining her husband and the right to the proceeds of the suit as her own property; and (3) the capacity to be sued without making the plaintiff join her husband, along with separate responsibility for her own torts. *See* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 4 (1923). These state statutes are collected in 3 C. VERNIER, AMERICAN FAMILY LAWS §§ 167, 179, 180 (1935).

Courts did not allow a cause of action for the wife's loss of consortium until the concept of equal marital rights, established by the Married Women's Acts, became generally accepted.[18] Initially this right to sue was limited to intentional tortious intrusions upon the marital relationship.[19] But in 1950, in the landmark case of *Hitaffer v. Argonne Co.*,[20] the United States Court of Appeals for the District of Columbia recognized a wife's right to sue for negligent impairment of consortium. In *Hitaffer* the defendant had inflicted severe and permanent injuries on the plaintiff's husband so that the plaintiff was deprived of his "aid, assistance, and enjoyment, specifically sexual relations."[21] The court noted that all jurisdictions denied a wife's action for negligent loss of consortium, but found that the underlying reasoning of the rule was "specious and fallacious"[22] and insufficient to support denial of the wife's action. Forty states have followed the *Hitaffer* court and presently recognize a wife's consortium rights in a claim based on negligent interference with the marital relationship. Only seven states have disallowed loss of consortium suits by wives.[23]

The *Hitaffer* decision established not only the wife's right to sue for loss of her husband's consortium but also the modern definition of consortium. The court altered the "marital services" interpretation, which previously had justified denying a cause of action for the wife, and defined consortium as a combination of the wife's marital services and love, affection, companionship, and sexual relations.[24] The court found that since these elements are part of an indivisible unit, injury to any one of them will support a suit for loss of consortium.[25]

Thus, the essence of the modern loss of consortium action is the harm one person suffers as the result of a close emotional relationship with an injured partner. Because the definition of consortium now emphasizes the intangible emotional aspects of a relationship, it is arguable that application of the consortium doctrine to those areas previously excluded from its coverage, such as nonmarital relationships, is still warranted.

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18. Comment, *The Negligent Impairment of Consortium—A Time for Recognition as a Cause of Action in Texas*, 7 ST. MARY'S L.J. 864, 868 (1976).

19. Thus, wives could bring suits for the torts of alienation of affection and criminal conversation. *See, e.g.*, Eliason v. Draper, 25 Del. 1, 77 A. 572 (Super. Ct. New Castle County 1910) (alienation of affections); Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918) (criminal conversation); Sims v. Sims, 79 N.J.L. 577, 76 A. 1063 (1910) (alienation of affections).

20. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

21. *Id.* at 812.

22. *Id.* at 819.

23. The following states deny the wife standing to bring a loss of consortium action. *Connecticut*: Lockwood v. Wilson H. Lee Co., 144 Conn. 155, 128 A.2d 330 (1956); *Kansas*: Hoffman v. Dautel, 192 Kan. 406, 388 P.2d 615 (1964); *Louisiana*: Bourque v. American Mut. Liab. Ins. Co., 345 So. 2d 237 (La. Ct. App. 1977); *New Mexico*: Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963); *Utah*: Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 985 (1972); *Wyoming*: Bates v. Donnafield, 481 P.2d 347 (Wyo. 1971). VA. CODE § 55-36 (1981) abolished the husband's right to bring a loss of consortium action for injury to his wife. The Fourth Circuit in Carey v. Foster, 345 F.2d 772 (4th Cir. 1965), interpreted this provision to bar parallel actions brought by wives.

24. 183 F.2d 811, 814 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

25. *Id.*

B. *Consortium Rights Outside Marriage*

Almost without exception, courts and legal scholars have embraced the view that a claim for loss of consortium depends directly on the marital relationship for its existence.[26] Thus, the issue in any particular case becomes simply whether a legal marital relationship exists under the facts.[27] An investigation of the underlying rationale of this doctrine and its universal acceptance reveals court holdings grounded in antiquated social attitudes and rife with stagnant policy concerns.[28] These decisions represent at best an uncritical adherence to the common-law interpretation of consortium, which is based on the husband's right to his wife's services.[29] As a result of these precedents, even potential plaintiffs thought, until recently, that a legal marital relationship was necessary to bring a loss of consortium suit.[30]

In the late 1970s and in 1980 a number of cases challenged the necessity of a legal marriage as an element of a valid consortium claim.[31] Although only one of these suits succeeded, five of the decisions display a range of policies that most often are applied in adjudicating—and denying—the expanded cause of action for loss of consortium. Contrary policies that are used in supporting this new claim appear in the landmark case of *Bulloch v. United States*.[32] In this 1980 decision granting an engaged couple's loss of consortium claim, the *Bulloch* court developed policy arguments that enabled it to create, without precedent, a right for engaged couples. A comparison of these conflicting sets of policies leads to the conclusion that the law should recognize the right of an engaged couple to sue for loss of consortium.

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26. *See, e.g.*, Tong v. Jocson, 76 Cal. App. 3d 603, 605, 142 Cal. Rptr. 726, 728 (1977); Tremblay v. Carter, 390 So. 2d 816, 817 (Fla. Dist. Ct. App. 1980); Angelet v. Shivar, 602 S.W.2d 185, 186 (Ky. Ct. App. 1980). *See also* 41 AM. JUR. 2D *Husband and Wife* § 447, at 373–74 (1968 & Supp. 1982); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 8.9, at 635–43 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 888–96 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 693(1) comment h, at 495, 498 (1977).

27. *See, e.g.*, Domany v. Otis Elevator Co., 369 F.2d 604 (6th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967).

28. *See, e.g.*, Sostock v. Reiss, 92 Ill. App. 3d 200, 207, 415 N.E.2d 1094, 1099 (1980) ("The recognition of a cause under the present circumstances would encourage an announced fiancé to assume the marital relationship, not in spite of intervening injuries to his fiancée, but rather due to monetary considerations."); Rademacher v. Torbensen, 257 A.D. 91, 13 N.Y.S.2d 124 (1939) (husband sustained no injury because the alleged tortious conduct against his wife occurred two months before they were married); Rockwell v. Liston, 71 Pa. D. & C.2d 756, 757 (C.P. Fayette County 1975) (since an action for consortium was an anachronism, the Supreme Court of Pennsylvania would be unwilling to extend the rule when no marriage existed at the time of the injury); Sartori v. Gradison Auto Bus Co., 42 Pa. D. & C.2d 781, 785 (C.P. Wash. County 1967) (A subsequent husband "should not be entitled to marry a cause of action. The tortfeasor . . . takes his victim as he finds him. The victim should not acquire new parties as she proceeds along the roads of romance.").

29. *See supra* notes 9–11 and accompanying text.

30. *See, e.g.*, Barrow v. Curtis, 209 So. 2d 699 (Fla. Dist. Ct. App. 1968), in which the court indicated that the plaintiff husband properly abandoned his claim for loss of consortium because the injury to his wife occurred before they were married.

31. Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980); Chiesa v. Rowe, 486 F. Supp. 236 (W.D. Mich. 1980); Tremblay v. Carter, 390 So. 2d 816 (Fla. Dist. Ct. App. 1980); Sostock v. Reiss, 92 Ill. App. 3d 200, 415 N.E.2d 1094 (1980); Angelet v. Shivar, 602 S.W.2d 185 (Ky. Ct. App. 1980); Sawyer v. Bailey, 413 A.2d 165 (Me. 1980).

32. 487 F. Supp. 1078 (D.N.J. 1980).

1. *The Policies Disfavoring Recognition*

In *Chiesa v. Rowe*[33] the plaintiff, whose husband had been injured during their engagement but prior to their marriage, sued for loss of consortium in the Federal District Court for the Western District of Michigan. The husband had suffered a spinal injury in an auto accident on January 24, 1979. After their marriage on July 1, 1979, the plaintiff sued for damages resulting from the loss of her husband's consortium.[34]

In dismissing plaintiff's claim the court advanced three principal arguments. First, it stated that consortium rights were an incident of, and were derived solely from, the marital relationship.[35] Second, the court reasoned that the plaintiff effectively had taken her husband "as is" by going forward with the marriage after he was injured. In essence, the court argued that the plaintiff was estopped from bringing an action for loss of consortium since she had been aware of her husband's condition prior to their marriage. The court therefore interpreted the marriage as a waiver of the plaintiff's rights to another level of conjugal fellowship.[36] Last, the court concluded that to allow this kind of action could unreasonably expand tortfeasors' liability and create a distinct problem of line drawing.[37] Citing two California cases,[38] the *Chiesa* court found that social policy at some point must preclude extension of liability for loss of consortium in all foreseeable relationships.[39]

Similarly, in *Angelet v. Shivar*[40] a Kentucky court of appeals dismissed an engaged plaintiff's loss of consortium claim simply by holding that a claim for loss of consortium depends directly on the marital relationship for its existence.[41] The plaintiff's complaint alleged that while his wife was a minor her father, the defendant, had intentionally inflicted extreme physical harm and emotional distress on her. The plaintiff claimed that, as a direct result of this conduct, his wife could not function properly as a wife and that he had been denied his consortium interest in her.[42]

Because the issue was one of first impression, the court looked to other jurisdictions for guidance and noted that the overwhelming majority of courts disallowed the action on policy grounds. The court reasoned that a person

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33. 486 F. Supp. 236 (W.D. Mich. 1980).

34. *Id.* at 236–37.

35. *Id.* at 238 (quoting 41 AM. JUR. 2D *Husband and Wife* § 447, at 373–74 (1968)).

36. 486 F. Supp. 236, 238 (W.D. Mich. 1980).

37. *Id.* at 238–39. Judicial line drawing in the context of loss of consortium claims is the judicial imposition of a limit upon the extension of liability to all foreseeable relationships. *See, e.g.*, Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Tong v. Jocson, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977).

38. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974); Tong v. Jocson. 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977).

39. 486 F. Supp. 236, 239 (W.D. Mich. 1980).

40. 602 S.W.2d 185 (Ky. Ct. App. 1980).

41. *Id.* at 186.

42. *Id.* at 185.

"should not be entitled to marry a cause of action"[43] and that "social policy must at some point intervene to delimit liability."[44] The court determined that, although the complaint alleged intentional rather than negligent misconduct, Kentucky would join those jurisdictions which hold that a valid claim for loss of consortium arises only when the injury to the spouse occurs after the marriage.[45]

In *Sawyer v. Bailey*[46] the Supreme Judicial Court of Maine employed a far more thorough legal analysis in refusing to expand the existing cause of action for loss of consortium. On July 3, 1977, Daniel Sawyer and Lynn Jackson announced their engagement and plans to marry on September 17, 1977. While driving to pick up their wedding invitations on July 14 they collided with defendant's automobile. The accident left Lynn with back and neck injuries that were treated continually before and after the wedding. Daniel subsequently sued to recover damages for loss of his wife's consortium, claiming that the loss resulted from the defendant's alleged negligence.[47]

Although the court acknowledged that any potential tortfeasor owed the plaintiff a duty of due care in relation to the plaintiff's fiancée, and, thus, that the plaintiff's anticipated marital rights were legally protected, the court held that conflicting policy considerations—especially the concerns for undue expansion of liability and judicial line drawing—outweighed this duty. Accordingly, the court maintained the status quo and denied the claim.[48]

In this way the court essentially followed the reasoning articulated by the *Chiesa* court.[49] First, it recognized that the right of consortium is rooted in the marital relationship.[50] Second, the court argued that the plaintiff took his wife "for better or for worse in her then existing state of health."[51] Third, it noted that although the plaintiff may have suffered harm, the threat of expanded tort liability and the problem of judicial line drawing precluded the cause of action.[52] Fourth, the court held that tort law protects "relational" interests of married persons and recognizes interferences with only those interests.[53] Last, the court recognized that Maine's policies of limiting property rights upon divorce to property acquired after the marriage, and of denying actions for breach of a promise to marry, represented the legislature's disapproval of

43. *Id.* at 186 (quoting Wagner v. International Harvester Co., 455 F. Supp. 168, 169 (D. Minn. 1978)).

44. 602 S.W.2d 185, 186 (Ky. Ct. App. 1980) (quoting Tong v. Jocson, 76 Cal. App. 3d 603, 605, 142 Cal. Rptr. 726, 727 (1977)).

45. 602 S.W.2d 185, 186 (Ky. Ct. App. 1980).

46. 413 A.2d 165 (Me. 1980).

47. *Id.* at 166.

48. *Id.* at 167–69.

49. *See supra* notes 33–39 and accompanying text.

50. 413 A.2d 165, 166 (Me. 1980) (citing Domany v. Otis Elevator Co., 369 F.2d 604 (6th Cir. 1966), *cert. denied*, 387 U.S. 942 (1967)).

51. 413 A.2d 165, 167 (Me. 1980).

52. *Id.* at 168.

53. *Id.* at 167 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 873 (4th ed. 1971)).

antenuptial contract rights and, therefore, antenuptial consortium rights.[54] The *Sawyer* decision presents the most convincing collection of policy arguments used by a court to deny an engaged couple's loss of consortium claim.

Sostock v. Reiss,[55] an Illinois appellate case, cited *Sawyer* with approval and emphasized the requirement that the relationship be a marital one. In *Sostock* the plaintiff's wife was injured in a horse-riding incident less than a month before their marriage. The plaintiff sued for loss of consortium, alleging that the defendant's negligence proximately caused his wife's injury.[56]

In denying the plaintiff's claim, the court went beyond the simple recognition that no marital relationship existed at the time of the injury. Rather, the court grounded its reasoning in the public policy and social concerns that must be considered, along with foreseeability, in determining the existence of a legal duty.[57] The court believed that the state policy of fostering and protecting the marriage relationship was the most important of these concerns. The plaintiff in *Sostock* had argued that denial of his claim would discourage a fiancé from marrying his prospective spouse; to the court, this argument implied that the plaintiff would be reluctant to marry without the prospect of a monetary gain from his fiancée's injury. The court advised that the plaintiff's decision to marry should be based on "mutual love, affection and respect" and "not on a mercenary motive."[58] Accordingly, the court denied the plaintiff's claim.

Tremblay v. Carter,[59] a Florida appellate case, reached the same result. In *Tremblay* the plaintiff attempted to recover consortium damages resulting from injuries that her husband sustained approximately five months prior to their marriage. She alleged that she and her husband had dated each other exclusively for approximately four months before the accident and had been discussing marriage at the time of the accident, but that his injuries had forced them to delay their marriage.[60] Though the court acknowledged the genuine nature of plaintiff's loss, it denied recovery in the interest of line drawing and of a public policy opposing undue expansion of liability.[61] The court noted that when an individual is injured many people may suffer. Brothers, sisters, and close friends may be seriously affected, yet no one suggests that they have a cause of action. Accordingly, the court determined that any extension of the consortium doctrine must result from legislation.[62]

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54. 413 A.2d 165, 168–69 (Me. 1980). The court also noted that the only contradictory authority, Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127 (E.D. Pa. 1973), a federal case interpreting Pennsylvania law, had been denounced by a Pennsylvania lower court in Rockwell v. Liston, 71 Pa. D. & C.2d 756 (C.P. Fayette County 1975).

55. 92 Ill. App. 3d 200, 415 N.E.2d 1094 (1980).

56. *Id.* at 202, 415 N.E.2d at 1095.

57. *Id.* at 206, 415 N.E.2d at 1098–99.

58. *Id.* at 207, 415 N.E.2d at 1099.

59. 390 So. 2d 816 (Fla. Dist. Ct. App. 1980).

60. *Id.* at 816–17.

61. *Id.* at 818.

62. *Id.*

2. *The Policies Favoring Recognition*

Although its facts differed significantly from those of the foregoing decisions, one landmark case, *Bulloch v. United States*,[63] held that legal marriage is not a prerequisite to a consortium claim. *Bulloch* concerned a couple who had been married for twenty-three years, had raised two children together, and then were divorced. A reconciliation quickly followed, and when David Bulloch was injured in a scuba diving accident shortly thereafter, the couple had already agreed to resume living together and, ultimately, to remarry.[64] David brought a tort action against his employer, the federal government, under the Federal Torts Claims Act[65] and the Suits in Admiralty Act,[66] and Edith Bulloch joined with her own suit for loss of consortium.[67] During the three years between the accident and the trial the Bullochs cohabited and represented themselves to the community as husband and wife. On the mistaken assumption that a valid New Jersey marriage required consummation, they did not remarry because the accident had left David impotent.[68]

Judge Ackerman inferred from the evidence that the Bullochs were engaged to be remarried and had planned their future lives, and the lives of their children, together.[69] More important, however, he presented several policy reasons for allowing a consortium claim that was not based on a marital relationship.

Judge Ackerman began by noting the paucity of opinions dealing directly with whether marriage is an essential element of a consortium claim and found a complete lack of such precedent in New Jersey.[70] He also recognized that changing social mores had made nonmarital living arrangements increasingly acceptable and that the legal status of unmarried cohabitants was in flux.[71] He cited two New Jersey Supreme Court cases in which the state court had refused to regulate private morality.[72] In addition, the judge acknowledged New Jersey's established policy of expanding tort liability to justly compensate those who are injured.[73] He reasoned that because an unmarried partner can suffer damage identical to that suffered by a married person whose spouse is injured, policy required recognition of a loss of consortium claim for couples outside the marital relationship. The state policy of compensating tort

63. 487 F. Supp. 1078 (D.N.J. 1980).
64. *Id.* at 1081.
65. 28 U.S.C. §§ 1346, 2671–2680 (1976 & Supp. III 1979).
66. 46 U.S.C. §§ 741–751 (1976).
67. 487 F. Supp. 1078, 1079 (D.N.J. 1980).
68. *Id.* at 1081.
69. *Id.*
70. *Id.* at 1084–85.
71. *Id.* at 1080.
72. *Id.* at 1082–83. In Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979), the New Jersey Supreme Court refused to penalize cohabitants and enforced an implied contract between unmarried partners. In an earlier decision, State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977), the state fornication statute was held to be an unconstitutional invasion of adults' right to privacy.
73. 487 F. Supp. 1078, 1085–86 (D.N.J. 1980).

victims for actual injury thus outweighed the state policy favoring the marriage relationship.[74]

The court dealt with the issue of expansion of liability by distinguishing the relatively small number of potential plaintiffs in this type of action from the large number of potential plaintiffs in the child's action for loss of society.[75] It was "obvious" that the cost of permitting children to bring suit is much higher than the cost of permitting a cohabiting partner to bring suit.[76] With this general background, Judge Ackerman reasoned that New Jersey courts would consider marital status immaterial to a consortium claim.[77]

III. Application and Evaluation of Traditional Tort Policies Disfavoring Consortium Claims

The modern concept of consortium, the changing makeup of society, and justice itself require a judicial approach to consortium claims that is more capable of recognizing the genuine loss of consortium experienced by partners in a close relationship, whether they are married or unmarried. Although, theoretically, American tort law attempts to shift the loss for every tortious injury,[78] contradictory policy arguments can preclude an effective remedy. As described above, courts have made five principal arguments against permitting loss of consortium recoveries to those engaged at the time of injury: (1) a loss of consortium claim is grounded in the marital relationship;[79] (2) foreseeability is lacking;[80] (3) a risk of undue expansion of liability for tortfeasors exists;[81] (4) the state interest favors marriage;[82] and (5) line drawing would become too difficult.[83] An analysis of these arguments in the context of fiancées'[84] loss of consortium claims follows.

A. *Basis of the Consortium Right in the Marital Relationship*

Apparently, the limitation of consortium rights to the marital relationship finds its roots in the holdings and dicta of the cases that first granted women the right to sue for loss of their husbands' consortium.[85] The majority of

74. *Id.* at 1085.
75. *Id.* at 1086.
76. *Id.*
77. *Id.* at 1087.
78. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971).
79. *See supra* notes 35, 41 & 50 and accompanying text.
80. *See supra* note 57 and accompanying text.
81. *See supra* notes 37, 38, 44, 52 & 61 and accompanying text.
82. *See supra* notes 57–58 and accompanying text.
83. *See supra* notes 37, 47–48, 52 & 61 and accompanying text.
84. Note that the plural form of "fiancée" represents both male and female engaged persons.
85. *See, e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811, 816 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950) ("Any interference with these rights . . . is a violation, not only of natural right, but also of a legal right arising out of the marriage relation."); Yonner v. Adams, 53 Del. 229, 250, 167 A.2d 717, 727–28 (Super. Ct. New Castle County 1961) ("Today, I find the common-law recognition of consortium to be founded . . . upon the enlightenment of our times and the dignity of the state of holy matrimony."); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 22 Ohio St. 2d 65, 65, 258 N.E.2d 230, 230 (1970) ("A husband and wife have, in the marriage relation, equal rights which will receive equal protection from the law.").

courts have cited and embraced the *Hitaffer*[86] holding that a consortium claim "springs from" the marital relationship.[87] Herein lies the basis for the derivative or definitional approach to consortium that has dominated the law to this point. Because the right was said to "spring from" the marital relationship, it was considered merely a derivative of the status of being a married person.[88] Thus, by fitting within the definition of "married," one attained the necessary status to support a derivative action for consortium when injury had occurred.

Recently courts have interpreted consortium to allow recovery outside the marital relationship. This development is best exemplified by the recognition in a majority of states of a parent's right to bring an action for the loss of his or her child's consortium.[89] Additionally, a few jurisdictions have recognized a child's right to bring a consortium claim based on its parent's injuries.[90] This expansion underscores both the concern of modern tort law that compensation be awarded to those injured by the wrongful acts of others and the incorporation of contemporary concepts of recovery into actions for loss of consortium.

The essence of a present-day loss of consortium claim is the loss sustained by one person as the result of a close relationship with an injured companion.[91] The modern doctrine clearly emphasizes the emotional aspects of the relationship. Consequently, the doctrine cannot logically be used to deny consortium rights to people in durable, committed, nonmarital relationships simply because of a legal formality. The consortium claim does not necessarily "spring from" the marital relationship. Rather, the claim arises from the type of relationship often found in *and* outside of marriage. The emotional commitment of the companions, not a marriage certificate, lies at the heart of the modern consortium doctrine. As the modern doctrine has expanded in both definition and application, the efficacy of the courts' definitional approach to consortium claims—granting an action to only those couples legally defined as married—has declined, giving rise to the need for a more functional approach.

A number of courts have only recently exhibited a willingness to recognize nontraditional relationships and to utilize a more pragmatic approach in

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86. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

87. *Id.* at 816. It is important to note that the "springs from" language was adopted by the *Hitaffer* court from a case adjudicated in 1889, Bennett v. Bennett, 116 N.Y. 584, 590, 23 N.E. 17, 18 (1889).

88. "Derivative" is defined as "[t]hat which has not its origin in itself, but owes its existence to something foregoing." BLACK'S LAW DICTIONARY 399 (5th ed. 1979).

89. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 882–83 (4th ed. 1971). *See, e.g.*, Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (1975); Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975).

90. *See, e.g.*, Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (1981). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 886–87 (4th ed. 1971) ("[T]he interest of the child in an undisturbed family life is at least of equal importance with that of either parent, and is entitled to equal consideration and redress; and the prediction may be ventured that the legal remedy will gain ground in the future." (footnote omitted)).

91. *See supra* text accompanying note 24.

adjudicating tort claims brought by members of such couples. These courts have examined the outward appearance of the nontraditional relationship, and the emotional and material investments of the participants, and have granted standing to parties in relationships that function as marital unions.[92] This approach is best exemplified by the line of unmarried cohabitant property claims initiated by the much publicized California Supreme Court case of *Marvin v. Marvin*.[93] In that case the plaintiff brought suit against the man with whom she had lived for seven years to enforce an alleged oral contract under which she was entitled to support payments and half the property acquired during that period in the defendant's name.[94] In granting legal consequence to the property rights of unmarried cohabitants, the *Marvin* court emphasized the societal acceptance of this type of relationship and the need for courts to recognize this development.[95]

In following the *Marvin* decision other courts have considered the level of commitment and the emotional and material investments of the partners in a nonmarital relationship to determine whether a real injury has occurred.[96] In this determination courts have weighed, for example, the duration of the relationship, the amount and types of services rendered by each of the partners, the opportunities foregone by entering into the relationship,[97] and the degree of economic interdependence.[98] This functional approach has expanded the ambit of the relational interests the law of torts attempts to protect.

It is clear, therefore, that limiting the relational interests protected by tort law to family relationships alone is unreasonable given the modern definition of consortium. An engaged couple can exhibit the commitment and experience the affection, love, and companionship that the modern consortium doctrine strives to protect. As Dean Prosser has stated: "[T]he law of torts is concerned . . . with what may be called relational interests, founded upon the relation in which the plaintiff stands toward one or more third persons. . . . [T]he relations of the family are a conspicuous *example*."[99] Prosser's failure to use exclusionary language is significant. The law of torts is not interested in protecting only legal relationships. It strives to protect also those interests that are incident to the intimate association between two persons. Regarding consortium interests, one can safely assume that marital

92. *See, e.g.*, Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W.2d 595 (1973); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978).

93. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

94. *Id.*

95. *Id.* at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.

96. *See, e.g.*, Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); Beal v. Beal, 282 Or. 115, 577 P.2d 507 (1978).

97. Kozlowski v. Kozlowski, 80 N.J. 378, 391, 403 A.2d 902, 909–10 (1979) (Pashman, J., concurring).

98. Beal v. Beal, 282 Or. 115, 122, 577 P.2d 507, 510 (1978).

99. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 873 (4th ed. 1971) (emphasis added) (footnotes omitted).

relationships at times do not reflect the elements on which a consortium claim is based to the same extent as some relationships outside marriage.[100]

An important argument for basing the right of consortium on the marital relationship is that if a couple has shown a serious commitment by marrying, then injury to one spouse will prove a loss to the other. Yet, given the current divorce rate in the United States, this presumption is no longer reasonable. Approximately forty percent of the marriages in America now end in divorce,[101] and sixty percent of all spouses will experience separation at some time during their marriages.[102] The commitment of marriage does not guarantee a relationship based on love, devotion, and affection.

The state of marriage evidently has become a mere transitory relationship for nearly half of those persons making vows. Consequently, it is unreasonable to continue to use the legal relationship of marriage as the starting point for a consortium doctrine that strives to protect the intimate association between two parties.

Clearly, committed relationships exist outside a state-sanctioned marital relationship.[103] Like marital situations, nonmarital relationships embrace a wide variety of arrangements.[104] In light of these facts and the modern definition of consortium, a court faced with an engaged person's consortium claim would be well advised to look beyond the definition of the relationship as "married" or "unmarried" and determine whether the relationship includes those interests accorded protection by the consortium doctrine.

B. *Lack of Foreseeability*

Traditional tort concepts limit liability to those injuries reasonably foreseeable to the defendant at the time of the accident.[105] The defendant owes a legal duty to the plaintiff only if this foreseeability requirement is met.[106] To object that extending consortium rights to engaged persons would violate this

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100. For example, compare a married couple who have lived apart (perhaps with other partners) for five years without any communication between them and with no intention of ever reuniting, with an engaged couple who have dated each other exclusively for five years, planned a wedding, and exhibited all the signs of affection, support, and companionship the consortium doctrine is designed to protect. Assume that one of the partners in each relationship is tortiously injured to the extent that he or she is rendered incapable of functioning normally. If legal marriage is required as a prerequisite to a loss of consortium claim, the deprived partner in the first couple will be granted standing to sue for loss of consortium, while the deprived member of the second couple will be denied that right. *See supra* notes 97–100 and accompanying text.

101. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY AND CHILD SUPPORT 1 (1979).

102. *See* Bruch, *The Legal Import of Informal Marital Separations: A Survey of California Law and a Call for Change*, 65 CALIF. L. REV. 1015, 1016 (1977) (citing R. WEISS, MARITAL SEPARATION 11 (1975), and W. GOODE, AFTER DIVORCE 174 (1956)).

103. *See* Beck, *Nontraditional Lifestyles and the Law*, 17 J. FAM. L. 685, 686–92 (1978–79); Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L. Q. 101 (1976).

104. *See* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 686 (1976).

105. *See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 250–70 (4th ed. 1971).

106. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 324–27 (4th ed. 1971).

principle is confused. Since tortfeasors are generally incapable of knowing the personal relationships in which their victims are involved, interference with any consortium rights is usually unforeseeable. Nevertheless, courts have not recognized this lack of foreseeability in consortium claims based on marital relationships and have held that it is reasonably foreseeable that a tort against an individual would interfere with the consortium rights of his or her spouse.[107] It is not illogical to extend this foreseeability doctrine to engaged couples. If it is foreseeable that an injured person is married, thus justifying imposition of liability for injury to the spouse, it is even more foreseeable that an injured person is *either* married *or* engaged, also justifying liability for injury to a spouse *or* an unmarried companion.

Thus, if tortfeasors owe no legal duty to engaged couples in stable, committed relationships, it is not for lack of logical foreseeability, but rather for lack of legal foreseeability. As noted above, the consortium interests protected by the modern doctrine are just as foreseeable in a nonmarital relationship as they are in a marital arrangement.

As the court stated in *Sostock v. Reiss*:[108] "The existence of a legal duty is not dependent on the factor of foreseeability alone but includes consideration of public policy and social requirements."[109] No policy prevents recognition of a loss of consortium cause of action for eligible engaged couples.

C. *Inordinate Expansion of Liability*

Another popular argument against allowing fiancées' loss of consortium actions is that a change would expand the liability of tortfeasors immeasurably.[110] This general objection has proved persuasive in most courts that have denied consortium recovery to children whose parents had been tortiously injured.[111]

A number of commentators have criticized this result as an arbitrary denial of compensation for genuine injury[112]—a criticism that is also applicable to engaged couples' claims. Judicial concern for undue expansion of liability is less justifiable in engaged couples' consortium claims than in children's claims in two respects. First, at any given time there are probably more dependent children eligible to bring suit for loss of a parent's consortium

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107. *See, e.g.*, Durham v. Gabriel, 16 Ohio App. 2d 51, 241 N.E.2d 401 (1968).

108. 92 Ill. App. 3d 200, 415 N.E.2d 1094 (1980).

109. *Id.* at 206, 415 N.E.2d at 1098.

110. *See supra* note 81 and accompanying text.

111. *See* Jeune v. Del E. Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954); Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *see also* Note, *Actions for Loss of Consortium in Washington: The Children Are Still Crying*, 56 WASH. L. REV. 487, 494 (1981).

112. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 896 n.26 (4th ed. 1971); Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916); Comment, *A Child's Independent Action for Loss of Consortium—A Change in the Iowa Tort Scheme*, 67 IOWA L. REV. 1081 (1982); Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U.L. REV. 722 (1976); Note, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231 (1975).

than members of engaged couples who seek compensation based on a partner's injury.[113] Second, an injured mother or father could have any number of children,[114] whereas an injured fiancée has only one companion who may bring a loss of consortium action.

Thus, in terms of judicial economy and extension of liability, the cost of extending loss of consortium rights to children is substantially greater than the cost of extending those rights to fiancées. Though extension of consortium rights to fiancées admittedly will represent an increase in consortium claims and in liability of tortfeasors, that increase will be minimal. This slight burden should be distributed to society in light of the harm caused by loss of consortium.

D. *The State Interest Favoring Marriage*

Another argument against a fiancée's loss of consortium action is that consent to this type of action would diminish the state's interest in marriage. The Florida appeals court in *Tremblay v. Carter* captured the essence of this state interest when it stated that "marriage has been the foundation of our nation's family life. Theologians consider marriage to be ordained by God, and secular authority has recognized its importance by subjecting it to comprehensive legislation."[115] The states have granted a legally protectable interest in the husband and wife because their commitment of unity hypothetically represents the creation of a stable entity permanently bound together by love, affection, and respect.[116] Indeed, it is the commitment and stability of marriage, rooted in the community values of love, affection, and respect, that the states have deemed worthy of legal protection.[117]

Yet, it is obvious from current divorce statistics in this country that marriage no longer guarantees a stable, committed relationship that deserves legal recognition and protection.[118] Clearly, the values underlying the state's interest in marriage are important and universally favored, but the conclusion that these values will inhere and flourish only in the marital relationship is no longer so obvious.

Some critics contend that to allow an engaged companion to recover for loss of consortium would diminish the underlying policies and values of the

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113. As of July 1981 there were an estimated 61 million children under 18 years of age in the United States. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SERIES P-25, NO. 917, PRELIMINARY ESTIMATES OF THE POPULATION OF THE UNITED STATES, BY AGE, SEX, AND RACE: 1970 TO 1981 at 1 (1982).

114. As an example, the injured mother in Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977), had nine children, each of whom brought suit for $100,000. *Id.* at 445, 563 P.2d at 861, 138 Cal. Rptr. at 305.

115. 390 So. 2d 816, 818 (Fla. Dist. Ct. App. 1980). *See generally* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976).

116. *See* Joiner v. Joiner, 246 Ga. 77, 78, 268 S.E.2d 661, 663 (1980); Towles v. Towles, 256 S.C. 307, 311–12, 182 S.E.2d 53, 54–55 (1971).

117. Towles v. Towles, 256 S.C. 307, 311–12, 182 S.E.2d 53, 54–55 (1971).

118. Since 1970 the divorce rate has climbed from 47 to 109 divorced persons per 1,000 married persons. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, SERIES P-20, NO. 372, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1981 at 1 (1982).

state's interest in matrimony. An Illinois appellate court advanced this argument in its clearest form in *Sostock v. Reiss*:[119]

> [Plaintiff] suggests that such a denial would encourage a fiancée to refuse to marry his intended spouse. By implication, the plaintiff's argument suggests that he would be reluctant to enter into a marital relationship without the prospect of a monetary gain resulting from injury to his fiancée. A decision to marry should be based on mutual love, affection and respect, not on a mercenary motive.[120]

Judge Ackerman, however, espoused a more positive view of mankind in *Bulloch v. United States*.[121] In responding to an identical argument, he stated: "While many considerations may lead to marriage, I doubt many decide to marry because they want to have a cause of action for loss of consortium. Deciding against a cause of action, . . . therefore, is unlikely to encourage people to wed."[122] It is significant that in the cases discussed above,[123] which were brought by partners in nonmarital relationships, the plaintiffs all were engaged at the time of injury and, therefore, unlikely to have married for the monetary gain resulting from injury to the fiancée.[124] Indeed, the *caveat emptor* approach of the *Sostock* court could, by implication, encourage deprived fiancées to leave their impaired companions rather than marry someone incapable of fulfilling their expectations. Rather than cushion the blow of lost expectations, the *Sostock* court would force the deprived spouse to choose either to leave the injured spouse or to lead a life wrought with uncompensated and unanticipated (at the time of engagement) physical and mental deprivation. This attitude represents a return to the antiquated doctrine that a man takes a wife as is, much as one might purchase goods from a commercial seller.[125]

The denial of loss of consortium claims to fiancées would only divest plaintiffs of any remuneration for actual losses suffered. Only tortfeasors who are lucky enough to injure an engaged rather than a married party would benefit from such a doctrine.[126]

Thus, the stability and support of the marital relationship encourages the state to recognize a legally protected interest in that relationship.[127] Consequently, the state's interest in marriage plays an important role in determining where the line is properly drawn in granting consortium claims.

E. *The Problem of Line Drawing*

A major problem in consortium law is the speculative nature of the consortium action itself. Because of the intangible quality of the interests pro-

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119. 92 Ill. App. 3d 200, 415 N.E.2d 1094 (1980).
120. *Id.* at 207, 415 N.E.2d at 1099.
121. 487 F. Supp. 1078 (D.N.J. 1980).
122. *Id.* at 1086.
123. *See supra* notes 33–62 and accompanying text.
124. *See supra* text accompanying note 120.
125. *See* Rademacher v. Torbensen, 169 Misc. 1030, 1033, 9 N.Y.S.2d 162, 166 (Super. Ct.), *rev'd*, 257 A.D. 91, 13 N.Y.S.2d 124 (1939).
126. Bulloch v. United States, 487 F. Supp. 1078, 1086 (D.N.J. 1980).
127. *See supra* note 117 and accompanying text.

tected by the consortium doctrine, it is often difficult to ascertain and compensate the actual loss. The difficulty in consortium actions does not lie in determining damages once a consortium case is made, because these damages closely parallel damages granted for infliction of mental distress.[128] Rather, the difficulty lies in determining initially whether the relationship is meaningful enough that actual injury might have occurred to the victim's partner. This initial determination is the point at which a party is or is not granted standing—the point of line drawing. Traditionally, standing to bring a loss of consortium action was based on the existence of a legal marital relationship.[129] The line was drawn at marriage because the parties had exhibited a serious commitment to each other through the exchange of vows. Presumably, any injury to one spouse resulted in a loss to the other.[130] The argument proceeds that since this formal assurance is not found in an engaged couple's relationship, to extend consortium rights to them necessarily would require burdensome judicial inquiries into the stability of the relationship to determine the possibility of genuine injury. Therefore, in the interest of judicial economy loss of consortium actions have been limited to married parties.[131]

Limiting loss of consortium claims to married parties would, indeed, conserve judicial energies. But this savings would be obtained at the expense of engaged couples who may have experienced real loss. For this reason the judicial conservation argument for drawing the line at marriage is unacceptable. The modern consortium doctrine protects a partner's right to the companionship, affection, and support inherent in a close, personal relationship. Clearly, the relational interests the consortium doctrine is meant to protect can exist in the relationships of engaged, as well as married, couples.

Thus, limiting loss of consortium recoveries to married couples effectively forecloses any possibility of compensation for real loss suffered by an engaged couple with close emotional bonds, while it grants an action to married couples who may have no significant attachment beyond the legal titles of husband and wife. This approach fails to acknowledge that the question whether a valid relationship exists is inherent in claims for loss of consortium brought by both married and unmarried partners.

Traditionally, proof of a legal marriage in a loss of consortium action gave rise to a presumption that the relational interests and stable relationship fostered by the doctrine existed to a degree sufficient to warrant legal protection.[132] Therefore, injury to one spouse was presumed to work an injury on the other spouse. In applying this presumption courts have refused to admit evidence offered by defendants to show inadequate consortium interests in

128. The problem of determining damages when the injury is intangible arises in any suit concerning emotional or mental distress and has been resolved adequately in that context. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971).

129. *See supra* note 26 and accompanying text.

130. *See supra* notes 85–88 and accompanying text.

131. *But see supra* note 114 and accompanying text.

132. *See supra* notes 35 & 50 and accompanying text.

the plaintiffs' relationships.[133] Yet rudimentary tort principles dictate that compensation be limited to actual loss.[134] In presuming injury to a spouse from proof of a legal marriage and excluding evidence regarding the plaintiff's relationship, a court violates these fundamental principles.

Marital unions include a wide array of relationships with varying levels of support, attachment, and companionship. Thus, actual loss in a consortium suit can be determined only by examining the relationship in question. The parties could begin by introducing evidence showing the quality and nature of the relationship and the degree of consortium damage suffered. This approach would allow a jury to deny damages when no sufficient consortium interest is shown and to allow small awards when actual loss is proved minimal. To some extent, this approach finds support in recent cases in which courts have upheld jury verdicts that favor an injured spouse but deny loss of consortium damages to the partner. Although the plaintiffs had proved injury to the impaired spouses, lack of evidence proving the condition of the relationships before and after the accident precluded loss of consortium awards.[135] Thus, the most logical way to arrive at accurate damage awards in loss of consortium claims is to determine the stability and quality of the relationship in question.

Like marriages, the relationships of engaged couples exhibit varying degrees of stability and companionship. To use marital status as the only basis for granting consortium rights ignores the emotional realities of those relationships. The existence of a legal marriage does not indicate the type of personal relationship in any case and, therefore, is an unsatisfactory criterion for judging whether a loss has occurred.

IV. A Proposed Approach

This Comment proposes that engaged couples be granted the right to prove damages for loss of consortium. An exchange of promises to marry assures some degree of stability in a relationship and gives rise to a reasonable presumption that the parties have made a substantial commitment to each other. This presumption warrants granting a cause of action for engaged couples' loss of consortium, which, in turn, will enable unmarried couples to introduce evidence on the nature of their relationship and the effect of the injury on it. Since these concerns already are investigated in marital consortium suits,[136] nonmarital suits will impose no additional analytical burdens on the courts.

To ensure that damages are granted only to plaintiffs suffering genuine

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133. *See, e.g.*, Bedillion v. Frazee, 408 Pa. 281, 183 A.2d 341 (1962).

134. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9–14 (4th ed. 1971).

135. *See, e.g.*, Guiterrez v. Hobbs, 505 P.2d 1318 (Colo. Ct. App. 1973); Welsh v. Fowler, 124 Ga. App. 369, 183 S.E.2d 574 (1971); Washington v. Jones, 386 Mich. 466, 192 N.W.2d 234 (1971); Hodges v. Johnson, 417 S.W.2d 685 (Mo. Ct. App. 1967); Christman v. Bailey, 38 A.D.2d 773, 774, 327 N.Y.S.2d 966, 967 (1972).

136. *See supra* note 135 and accompanying text.

loss in nonmarital consortium claims, the courts should take the same approach as that established for marital suits.[137] The plaintiff would first introduce evidence showing the quality of the relationship and the degree of injury the accident caused. The defendant could then introduce evidence to minimize the plaintiff's claims of significant consortium interests and injury. This approach would lead to more equitable line drawing and safeguard relationships that exhibit the commitment, companionship, support, and affection that the consortium doctrine protects.

Any new cause of action must not only reflect legal theory, it must also include procedures that will enable courts to implement its underlying policies. The approach that this Comment proposes rests on the assumption that relationships both in and outside of marriage can be stable, loving arrangements. Therefore, the right to any consortium claim should be granted to only those parties who can establish that their relationship is both stable and meaningful. This test could be met by evidence showing stability and affection, such as duration of the relationship, exclusivity of relations, extent of economic cooperation, existence of mutual contracts, number of children, and monetary expenditures for joint endeavors.[138]

Procedurally, the use of presumptions can aid in applying the stable and meaningful test. Because of the state interest in the marital relationship, proof of marriage should establish a rebuttable presumption of a stable and meaningful relationship. Only if the defendant can prove that no legal marriage exists must the plaintiff prove the existence of a consortium interest through affidavits.

For an unmarried couple, proof of engagement with accompanying evidence showing a committed relationship should be enough to pass the stable and meaningful test and to avoid a summary denial of standing to bring their claim. In this way plaintiffs who were engaged but not yet married at the time of their injury will be able to establish the genuine nature of their consortium interest and injury.

V. CONCLUSION

The history of consortium law and the policies behind granting awards for loss of consortium disclose no adequate arguments for denying the right of a loss of consortium action to plaintiffs who are engaged at the time of injury and who subsequently marry. None of the arguments used to deny this cause of action explain why a functional, practical approach cannot operate to pro-

137. *See supra* text accompanying note 135.

138. *See* Comment, *Loss of Consortium and Unmarried Cohabitors: An Examination of* Tong v. Jocson, 14 U.S.F.L. REV. 133, 154 (1979). *See also supra* text accompanying notes 96–98.

vide more equitable results in this area of the law. Legal recognition of unmarried couples' loss of consortium suits will require more courts to acknowledge the modern definition of consortium and to apply it to stable and meaningful relationships both in and outside of marriage.

Kris Treu